

ANALYSIS



The Law Reform Commission Report on Product Liability

Introduction

Mrs Donoghue had to sue the manufacturer of the ginger beer which was alleged to contain a snail, and to have made Mrs Donoghue ill, because a friend, and not she herself, had paid for it. If she had bought it herself she could have sued the sellers, the owners of Minchella's Café, and would not have had to prove negligence (and the leading case in Scottish and English product liability law would not be called *Donoghue v Stevenson*¹). The defects of the existing law include these facts: that while those who contract with suppliers have a cause of action in tort with strict liability for breach of the implied conditions as to quality, those who have no contract — either because, like Mrs Donoghue, they did not buy, or because the retailer cannot be sued and the manufacturer is the only practicable defendant — must prove negligence; and that when many goods are imported the manufacturer may be half a world away. There are other problems, which may be even more difficult, such as proving a causal connection between negligence and the injury.

The Law Reform Commission (LRC) has just proposed the adoption in Hong Kong of provisions, based very much upon the UK Consumer Protection Act 1987, creating a strict civil remedy against producers for defective products causing damage, and have recommended protection for the consumer which is in some ways more generous than that in the Act.² The Act was in implementation of a European Directive of 1985;³ indeed, it has been said that the UK would not have adopted a product liability regime had it not been for the Directive. The report is very timely, as we contemplate the implications of bird flu, ciguatera-toxin-infected reef fish, cholera-bearing cockles, CJD-carrying blood products, another case of a child drowned in a top-loading washing machine, and smoke-inducing furniture stuffing.⁴

¹ [1932] AC 562.

² *Report on Civil Liability for Unsafe Products* (February 1998) (LRC Report). I must now swallow a few words — those in which I said that I did not imagine Hong Kong would ever adopt these provisions: see Jill Cottrell, 'Product Liability' in S Nossal (ed), *Law Lectures for Practitioners 1993* (Hong Kong: Hong Kong Law Journal Ltd, 1993), p 70.

³ Council Directive 85/374/EEC of 25 July 1985 (the Directive).

⁴ Bird flu: a new form of virus which was able to pass from chickens to humans, widely reported in the Hong Kong and international media in November/December 1997; reef-fish: fish with high levels of toxin caused by poisonous dinoflagellate algae: 'Warning from the Deep,' *South China Sunday Morning Post*, 25 January 1998; 'Cholera Tests for Cockles,' *South China Morning Post*, 12 February 1998; 'Toddler Drowns in Washing Machine,' *South China Morning Post*, 7 January 1998; 'Flammable Sofa Stuffing "Catalyst for Fire Tragedy,"' *South China Morning Post*, 28 March 1998.

The purpose of the reform proposed, in a nutshell, is to make available to injured plaintiffs a defendant who is accessible, and to eliminate the necessity to establish negligence while, as far as possible, placing the responsibility on the person most responsible for the defect. The legislation, if it comes to pass, will create a new tort, substantially of strict liability, placed upon producers (or in some circumstances, importers, or even retailers or distributors, or those who place their own brand name on the goods manufactured by another). Although Hong Kong has had some new product safety legislation in recent years, notably the Toys and Children's Products Safety Ordinance,⁵ and the Consumer Goods Safety Ordinance, these have been assumed not to create civil liability.⁶

The purpose of this short article is to summarise and explain the LRC proposals and to make a few criticisms of them, while also discussing what impact their implementation might have upon some headline-hitting events of recent years. It will discuss the various aspects covered in the LRC report: what goods are to be covered, what defects in the goods, who is to be liable, for what damage, what defences should be applicable, and should there be any unusual limitations upon liability, in terms of time or amount?

Aspects of the report

Goods

First of all — what goods? Generally the LRC proposals follow the English legislation, which itself largely reflects the Directive. Ten years after the UK Act was passed there remains a remarkable variety of opinion among English writers on the scope of some of the provisions. The LRC has specifically addressed one or two of these points, but for Hong Kong legislation it might be wise to clarify some of the controversial issues — unless of course the legislature is itself unable to reach a conclusion and wishes to leave it to the courts. The Act does not provide a complete definition, merely saying that products mean 'goods or electricity'⁷ and goods *includes* 'substances, growing crops and things comprised in land by virtue of being attached to it and any shop, aircraft or vehicle.'⁸ 'Substances' include gas.

Primary products

One controversy generated by the UK legislation, and the Directive, was over whether agricultural and fisheries products should be covered, even before they had undergone some processing. The power of the farming and fishing lobbies in Europe is reflected in the fact that these, as well as game, are excluded.⁹ Not until they have undergone some primary processing, or some 'industrial process'

⁵ See Cottrell (note 2 above).

⁶ See *ibid* and LRC Report, p 10.

⁷ s 1(2).

⁸ s 45.

in the words of the Act,¹⁰ will liability arise. Hong Kong's farmers and fishermen are diminishing breeds,¹¹ and apparently less powerful than those of Europe, for products of the sea and soil, as well as animals, are included in the recommended reforms, among the reasons given for this being that there have been 'recurrent problems of contaminated vegetables and seafood.'¹² This will avoid one potential uncertainty in the English legislation, a 'bizarre lottery for the injured' one writer describes it,¹³ being introduced into Hong Kong: namely what industrial process is sufficient to bring an originally natural product within the legislation?¹⁴

Land

The LRC recommends that, as in the UK Act,¹⁵ this new liability should attach to objects attached to the land, which would include things which are part of buildings, such as window frames and doors, or those implanted in the land itself such as flagpoles or a cable car support.¹⁶ However, it would not include the actual building, which is not appropriately described as 'a thing.' This means that one might sue under the proposed new legislation if a plank forming a stair-tread is defective and causes damage, but not because the workmanship in erecting the plank is faulty. Nor can one sue because the building itself is defective in a way which causes injury to occupants, for example in having 'sick building syndrome' caused by the air-conditioning.¹⁷

Blood and body parts

The LRC states that the Directive does not include blood and human tissue and parts, though this is not clear from the wording of the Directive.¹⁸ It seems to

⁹ See Jane Stapleton, *Product Liability* (London: Butterworths, 1994), p 305.

¹⁰ s 2(4).

¹¹ The Agriculture and Fisheries Department reports that in 1996 there were 4,500 fishing vessels with 19,200 fishermen of whom, since it is difficult to recruit locally, 6,300 were from mainland China. There were 1,540 licensed mariculture operators. 'In 1996, local production accounted for 15% of fresh vegetables, 22% of live poultry and 11 per cent of live pigs consumed.' This information can be derived from the annual reports of the Hong Kong government and from the website of the Department <<http://www.info.gov.hk/afd/>>.

¹² Para 7.35.

¹³ Stapleton (note 9 above), p 305.

¹⁴ For discussions of this, raising issues such as whether modern farming practices cannot themselves be described as 'industrial,' and whether automated slaughtering, or freezing fish in factory ships or peas on farms, are industrial processes, see eg Alastair M Clark, *Product Liability* (London: Sweet & Maxwell, 1989), p 54 and Barry Cotter, *Defective and Unsafe Products: Law and Practice* (London: Butterworths, 1996), p 126. The LRC itself mentions one doubtful activity, namely mincing meat, at p 62.

¹⁵ s 45 of the Act.

¹⁶ Clark (note 14 above), p 52 says that things like the latter are 'arguably' included.

¹⁷ An example suggested by Stapleton (note 9 above), p 306. If the air-conditioning itself were faulty, as opposed to installed in a faulty way, there would be liability as with the faulty plank.

¹⁸ The LRC Report para 7.26 cites Susanne Rinderknecht, 'The European Community' in Campbell (ed), *International Product Liability* (London: Lloyd's of London Press, 1993). She says at p 605 that 'blood, parts of the human body, and organs are raw materials and therefore not products.' This is questionable, the Directive defining products as 'all movables with the exception of primary agricultural products.'

be the view of the LRC that the Hong Kong law should be the same. However, one finds the English authors somewhat unclear as to whether blood is covered. Atiyah has suggested that because blood is traditionally not an item of commerce in England, it should not be regarded as embraced in the concept of 'goods' in the Sale of Goods Ordinance.¹⁹ This may indeed be the tradition in the UK, but it is not so in the USA, or in China where the government recently indicated that it might ban the sale of blood.²⁰ Can we interpret a piece of Hong Kong legislation in the light of the UK traditional approach to blood donation, even if Hong Kong has inherited that tradition, especially now that we are part of China? Not all authors have thought that blood is not covered — one has suggested that though the blood donor would not be covered, not having supplied the blood by way of business (even if it was considered appropriate to think of the human being as the producer), the Red Cross or other body which took the blood from the donor could be considered to have 'abstracted' the blood, and thus to be a producer as defined by the Act.²¹ Blood extracts, such as plasma, could surely be considered to be 'product.'²² However, in order for liability to exist the defendant must have 'supplied' them to someone, and further problems may arise as to whether a blood transfusion can be so described (see below). There may be good reason for excluding blood, but if the intention is that blood should not be covered the law should say so. The LRC report in fact mentions this so briefly that it is hard to say they had formed a clear intention on this issue, and if they took the view that blood should not be covered, they do not articulate why.

So far as organs are concerned, one might argue that they are not traditionally items of commerce, at least if from the dead, because at common law no one owns a corpse.²³ But it has been observed that, far from it being thought that organs from the living cannot be sold, it has been necessary to legislate to prohibit their sale.²⁴ Thus it would seem that a court might well hold that they are 'goods,' or 'movables' in the Directive language. True, a court might well hold that there was no supply by the donor or relatives in the course of business. But the position of the hospital which removed the part might be rather different (see below). Again, it would be best to make this explicit. On the other

¹⁹ Now P S Atiyah and John Adams, *The Sale of Goods* (London: Pitman, 9th ed 1995), pp 22-3, but see also p 235.

²⁰ 'Human Blood Sales Banned in Drive to Prevent Contamination of Supplies,' *South China Morning Post*, 31 December 1997.

²¹ Clark (note 14 above), p 64.

²² Most states in the US expressly exclude blood products from strict liability regimes, see Stapleton (note 9 above), p 310. The underlying reason seems to have been fear of discouraging important activities.

²³ *Handyside's Case*, 2 East PC 652 (nd).

²⁴ For Hong Kong see Human Organ Transplant Ordinance. In the case of the organs of a person already dead the relevant ordinance, the Medical (Therapy, Education and Research) Ordinance, which authorises the use of body parts in some circumstances and states who may give approval, does not actually forbid payment.

hand, so complex is the science, not to mention the law, about human body derivatives, that it would be a mistake to delay action on the PRC proposal until all the ramifications had been sorted out.²⁵

Water

After blood — water. This is not mentioned by the LRC. It is not expressly mentioned by the Directive but there seems no reason why it cannot be included in the definition of 'product';²⁶ the UK Act refers to 'substances' which include naturally occurring liquid and vapour. As with blood there may be no manufacturer but there is an abstractor and, in the case of the water Hong Kong imports from across the border, also an importer. Indeed, one of the few English cases under the Act arose from the contamination with aluminium sulphate of a local water supply; the water company admitted liability.²⁷

Published matter and computer software

Books and computer programs raise somewhat similar problems. Indeed, various forms of publishing are now tending to merge — even the Hong Kong Law Journal is available to some extent in electronic form!²⁸ The main problem is whether the ideas or the creative content should be viewed as not 'goods' because they are too abstract or their physical manifestation makes them goods. In the case of electronic communication, what form of manifestation is enough to make them 'goods'?

There has been discussion as to whether the English legislation, or the Directive, includes published matter such as books and maps, adding 'a new terror to authorship' as Atiyah puts it.²⁹ As we shall see later, only damage to the person or property is covered by the legislation, so there is limited scope for liability for printed matter. But the hypothetical chart-maker conjured up by Denning in *Candler v Crane, Christmas*,³⁰ or the real school chemistry book which contained an error liable to cause explosive consequences,³¹ are examples. Again the LRC thinks that the English definition should be accepted, and

²⁵ See, eg, Bartha Maria Knoppers et al, *Legal Rights and Human Genetic Material* (Canada: Edmond Montgomery Publications Ltd, 1996) for a discussion of some complexities.

²⁶ Jocelyn Kellam et al, *Product Liability Law and Practice* (Sydney: Legal Books, 1996) (Release 2) [2:100].

²⁷ The story is told in Christopher Hodges et al, *Product Safety* (London: Sweet & Maxwell, 1996), pp 420ff. Because of the admission of liability the case is reported only on damages.

²⁸ See <<http://www.hku.hk/law/hklj/index.html>>.

²⁹ Note 19 above, p 236. The original terror was in a quite different context — of the case *Hulton v Jones* [1909] 2 KB 244, [1910] AC 20 which held a newspaper liable for defamation when they could not have known they were in danger of defaming someone — see *Knupffer v London Express* [1943] KB 80, 89.

³⁰ [1951] 2 KB 164, 183.

³¹ Not a litigated case, see Clark (note 14 above), p 53. But see Simon Whittaker, 'Product Liability and Intellectual Products' (1989) 105 LQR 125, 134 referring to *Walter v Bauer*, Supp, 439 NYS 2d 821 (1981), App Div 451 NYS 2d 533 (1983). See also Kellam et al (note 26 above), pp 2-7n: French book not making clear the similarity of wild carrot to poisonous hemlock! (criminal case) (also Whittaker, above, p 133).

seems to assume that this excludes 'intellectual works,' which would cover books.³² But it is not crystal clear that the definition in the Act would exclude these,³³ and some authors seem to have no doubt that books are products and they would be covered by the Directive and the Act.³⁴ A rather different issue is that of freedom of speech, which has been an issue in some US cases, though this would not be so in the case of maps or charts.³⁵

In the first English case to address the question of whether software can be 'goods,' Glidewell LJ said:³⁶

In both the Sale of Goods Act 1979, s 61, and the Supply of Goods and Services Act 1982, s 18, the definition of goods includes 'all personal chattels other than things in action and money.' Clearly, a disk is within this definition. Equally clearly, a program, of itself, is not.

'Software' can be used to refer either to both the diskette or other recording medium and to the program recorded thereon.³⁷ Glidewell LJ holds that 'goods' in the legislation referred to does not include the program alone. On this basis, and if we assume that the concept of goods as 'personal chattels other than things in action and money' holds good for other legislation, there would be no liability under the product liability provisions of the Consumer Protection Act for a program supplied without the use of a physical carrier such as a CD or floppy disk (for example downloaded from the Internet, or loaded by a supplier who never passed possession of the disk). But Glidewell LJ goes on to hold that where a disk is supplied it includes the program which is therefore part of the 'goods.'³⁸

The LRC's own recommendation is this:

standardized software which is integrated into the computer to run the hardware and without which the computer cannot function, should be treated as part of the computer, and should be included in the definition of product. On the other hand, computer software which is specially written

³² The LRC again cites Rinderknecht (note 18 above), who at p 606 says baldly that movables do not include intellectual works, and it does not, in para 7.26, explore what 'intellectual works' covers.

³³ See Atiyah (note 19 above), p 24n discussing another US case, on poisonous mushrooms: *Winter v G P Putnam's Sons*, 938 F 2d 1033, 9th Cir (1991).

³⁴ Clark (note 14 above), p 65, and Whittaker (note 31 above). Glidewell LJ in the case of *St Albans* referred to below (note 36) took the view that instructions in a book of instructions (the example he took was a car manual) were part of the goods.

³⁵ For example *Walter v Bauer* (note 31 above), Whittaker (note 31 above), pp 134-5.

³⁶ *St Albans City and District Council v International Computers Ltd*, mentioned in the LRC report p 59n; now reported at [1996] 4 All ER 481, 95 LGR 592, 15 Tr L 444, [1997] FSR 251. The quotation comes from [1996] 4 All ER 481, 493. Only Glidewell LJ addressed this issue, so his observations are obiter.

³⁷ Ibid, pp 492-3.

³⁸ This approach is foreshadowed by, for example, Lynda Farmer, 'Non-contractual Liability' in Stephen Saxby, *Encyclopædia of Information Technology Law* (London: Sweet & Maxwell, looseleaf), para 7.505.

for a client's particular business or purpose should be regarded as intellectual work and hence not a product under the proposed new form of liability.³⁹

The idea that software which is supplied as a part of a product should be covered corresponds with the suggestion of the Department of Trade and Industry in the UK in connection with the UK Act.⁴⁰ Software is supplied not only with computers — or at least computers are a part of an increasing number of consumer and other products these days, from cars to hi-fis and washing machines. The failure of the computer or the integral software would clearly be a fault in the product itself. There remain a few problems with the LRC statement. First, it seems to leave a good deal of software not covered. Software which is integrated into the computer and without which it will not work would seem to cover the operating system. But for most people a computer will not do anything useful without more software. I cannot write this without a word processing program, and that program will not work without Windows 3.1 or 95. Many people will buy their computer 'bundled' with a considerable amount of software; should this be treated as 'part of the machine'? Is it part of the machine if loaded by the dealer, but a separate product if supplied on diskette or CD? Or can only the operating system be described as part of the machine? The LRC is not very explicit about how it proposes that software which is neither integral to the computer nor specially designed should be dealt with. According to the passage quoted from the LRC report, specially prepared software is 'intellectual work'; what about mass produced software? Again the Glidewell approach suggests that mass produced software provided in physical form is 'goods,' as we have seen. But the LRC itself seemed to be assuming that books were 'intellectual works' and not covered, which, as we have seen, is not the universally shared view, and not consistent with the Glidewell view of software. Is there any reason why books and software should be treated separately?

Finally, is it necessarily right even for specially written software to be excluded? Very often there would be no necessity for the new type of liability — the law of contract would cope perfectly adequately, as it did in the *St Albans* case. And much specially written software would have the capacity to harm only commercial property anyway (see below). But if it were, for example, written for the purpose of air traffic control it could have the capacity to cause serious personal injury to people who would have no contractual rights against the software producer.

Another problem about the exclusion of all except operating systems from the scope of liability would be that 'new liability' might not attach to the producers of software which includes a virus.⁴¹ If the virus were part of the

³⁹ Ibid, para 7.37-8.

⁴⁰ Farmer (note 38 above), para 7.506; an extract is reproduced in Clark (note 14 above), p 53.

⁴¹ A suggestion raised by Atiyah (note 19 above), p 233.

program supplied on a disk it would seem that the LRC approach would exclude liability — but the Glidewell approach would not. If, on the other hand, the virus were an ‘extra,’ as it were, on the disk but not part of the supplied software, it might be possible to argue, even on the basis of the LRC approach, that the disk was defective. Software downloaded from the Internet, or transferred from another machine, or even loaded on by a supplier without any transfer of the disk would not be covered. If the virus damaged only data and not the computer, it would be necessary to decide anyway whether this was ‘property’ damage (see below). Clearly this is all so difficult for non-specialists that the law ought to be explicit.

Components

Another issue is whether the producer of something which is, or becomes, a component of another thing (which we might call the ‘major product’) should be exempt from strict liability under the legislation. The LRC, following the UK Act, recommended that the component producer should remain liable.⁴² Most people, of course, would be inclined to sue the producer of the major product; only if for some reason that person was ‘unsuable’ would they want to look to the component manufacturer. The liability proposed to be placed upon component manufacturers would, however, be higher than in England because there damage to the thing itself, or to a ‘major product’ in which the component was comprised at the time of supply, is not covered by the Act; as we shall see, the LRC proposal is different.

Waste

Some writers have raised the issue whether waste products might be included as products. This might come up where waste material is supplied for the purposes of a business. There seems no inherent reason why waste should not be a ‘product,’ even though it is a by-product. Some waste material is, of course, hazardous. Disposal of much of it would be regulated by the chemical waste legislation made under the Waste Disposal Ordinance. However, that does not on the face of it give rise to civil liability, negligence or breach of contract aside. In order for waste to be covered by the proposed legislation, not only would it have to be a ‘product’ but it would have to have a ‘defect’ — which would probably only be the case if the waste contained some unexpected property (see below). Another interesting issue would be whether someone who delivers waste to another as part of a disposal operation ‘supplies’ it. At least one author has taken the view that he might be held to have done so.⁴³ The LRC does not discuss waste.

⁴² LRC Report, para 7.46ff.

⁴³ Richard Kidner, ‘Toxic Waste and Strict Liability for Products’ (1988) 138 NLJ 379.

Second-hand goods

Nor does the LRC raise another question which some writers discuss — second-hand items. There is nothing in the LRC report which excludes such items, provided they are supplied in the course of a business. Stapleton asks whether the Directive was intended to cover charities which sell second-hand items such as toys.⁴⁴ If the original manufacturer is identifiable the charity would escape liability if the manufacturer were in Hong Kong, and the same would be true if one could identify an importer, but this is less likely. If the defect is subsequent to supply by the original manufacturer he would escape liability. The charity would also escape liability if it could identify the donor, even if that person would not be liable, not having supplied it in the course of business.

Who is liable?

The English legislation places liability upon the producer, the importer, and anyone who by putting his name or mark on the goods has held himself out to be the producer (the own brander); we can call these the principal liability holders. However, since many consumers will not know the identity of anyone other than the retailer (and possibly the producer who may not be in Hong Kong), it is also provided that someone who supplied the goods, whether to the person who suffered the damage or not, is liable unless within a reasonable time he or she identifies a principal liability holder, or failing that a prior supplier.⁴⁵ The idea is that consumers can go to the person whom they identify as the supplier and insist on information as to who supplied that person, working back until there is identified a principal liability holder who is in Hong Kong. In a place like Hong Kong, where many goods are imported, the potential main innovation of this legislation would be the possibility of suing the importer.

The own brander will be liable, it should be noted, if he holds himself out as the producer. If, on the other hand, the goods say 'manufactured for' or 'imported for' the retailer or distributor, it would seem that there has been no such holding out, though there might be room for argument: does 'manufactured for' perhaps suggest manufactured as agent? However, the own-branding retailer could be the first line defendant, so the practical difference would not be great.

Farmers and fishermen

The LRC recommends that, in terms of who is liable, the Hong Kong law should be the same as that in England. It will work slightly differently, in fact, because of the decision not to exclude primary products. Indeed, it will be necessary to consider what definition should be given of 'producer.' The UK Act refers to manufacturers, to those who have 'won or abstracted' the product,

⁴⁴ Note 9 above, pp 312-13.

⁴⁵ s 2(3).

or, if none of these applies, to those who carried out an industrial or other process which imparted 'essential characteristics' to the product.⁴⁶ The last is essentially intended to cover primary products of sorts which are excluded from the Act; liability attaches once they have been 'processed.' This is irrelevant for the Hong Kong situation, since it is not intended to exclude such primary products. It would not, however, be good enough to adopt the English definition simply leaving out the reference to 'process.' Manufacturing, winning, and abstracting cover much of the ground, but would not cover those who farm, especially animals, nor perhaps those who pluck fruit, and it would leave room for considerable argument about the meaning of 'abstracting.'

The LRC does not seem to have considered the fact that to have decided that primary agriculture and fisheries products etc should be covered does not conclude the question of who should be liable. If it is intended that farmers and fishermen should be liable it would be better to say so explicitly, though the word 'producer' itself might cover farmers. Words such as 'cultivate' and 'harvest' or 'pluck' should perhaps be added to the definition. And if it is intended that any of these should not be included, then it should be made clear. Among areas of particular difficulty might be farmers who import eggs or baby creatures (day-old chicks or fish fry, for example) and then grow them to maturity in chicken or fish farms. If the farmer is also the importer there would be no problem. But if a farmer buys already-imported fertile eggs, hatches them, and sells the mature birds can he claim that there was a prior supplier — namely the importer? Did the importer import chickens?

Not only will liability rest on people who abstract fish, and on farmers, provided they are within Hong Kong, or importers if they are not, but the suppliers of such goods will be liable (if they cannot identify someone further back in the chain). In England people who handle such goods will not be liable unless and until some industrial process has been carried out on the goods. Indeed, in that country it would not be clear whether the restaurant which serves contaminated fish is liable — is cooking an industrial process?

In the case of the fisherman who fishes in the waters of the Indonesia and comes into Aberdeen harbour and sells the fish to the wholesale fish market, who is liable? In England the fisherman would not be liable, because this is primary produce not covered by the Act — unless possibly the fish are frozen on the ship and this is held to be an industrial process. Nor would the retailer be liable, though there would again be a question if the latter processed the fish in some way. In Hong Kong the fisherman is clearly the producer (using the English definition) for he has abstracted the fish from the water. Is he also the importer? Presumably so. On the other hand, if the fish merchant cannot identify the particular fisherman who sold him the fish, the liability presumably

⁴⁶ s 1(2).

rests with the merchant. If the restaurant cannot identify the wholesale fish merchant who sold the fish, the liability will rest with the restaurant. The LRC hopes that retailers will keep good records of who supplies goods precisely in order to meet such possible claims — something which would help in the control of outbreaks of cholera and other problems arising from contaminated food, for example.⁴⁷

Quite apart from the issue of clarity there are some policy decisions which would have to be made. Ought the fisherman or the farmer to be liable? Pig farming and chicken farming have become large-scale industries in Hong Kong, partly because of the requirements under the Livestock Waste Scheme.⁴⁸ But marine fish farmers are mainly small family concerns. Perhaps it is not they who ought to be liable as the major liability holder. Similarly it might be thought inappropriate to hold the owners of a family fishing vessel liable. The purpose of the legislation is presumably to ensure that there is a defendant who can be sued and who is worth suing. Anyway, if we are to treat such a fisherman as the importer, some fishing vessels which come into Hong Kong to sell their catch are presumably not local ships, and to hold them liable as importer would again defeat the purpose of the legislation which is to have a defendant in Hong Kong who is liable.

The omission of the reference to industrial or other processes may affect another area of some uncertainty in English law: is the printer of a book liable (assuming books are covered at all), or the packers or labellers of goods, or the assemblers of parts made by others, or someone who substantially reconditions an old piece of machinery? The use of the word 'producer' simpliciter might leave some of these potential areas for argument, or might even create more uncertainty.⁴⁹

The LRC was exercised by the possibility that someone might import goods using a shell company — a wholly owned subsidiary with no assets. Although they felt this was unlikely — the trouble associated with setting up a system would not be worth the potential benefit — they recommended that the definition of importer should extend to those who import 'directly or indirectly'.⁵⁰ The effect of this provision is presumably to cover the situation where a shell company is the agent of the other — this is 'indirectly' importing. Arguably it is unnecessary — a company ought to be liable under the English law if it imported through an agent, whether that agent is a human or an artificial person.

⁴⁷ LRC Report, para 7.45(b).

⁴⁸ See Agriculture and Fisheries Department website and the Government Annual Report (see note 11 above).

⁴⁹ These possibilities are mentioned by Cotter (note 14 above), p 124.

⁵⁰ LRC Report, para 7.32.

Supply

As mentioned earlier, the supplier may be liable if unable to identify an earlier supplier. 'Supply' is defined in the UK Act very widely,⁵¹ including providing the goods in return for any consideration other than money (which is the basis for the argument that someone who hands over waste for disposal may be supplying it, because this would be in return for consideration — that the other will take the waste away⁵²). A hospital which transfuses blood would, one supposes, be a supplier if there was consideration under a 'contract for work and materials.' If there was no consideration it would be a gift, which is still covered by the English definition.

A few people who would otherwise fit the description of supplier or primary liability holder may escape if they can establish certain defences.⁵³ First, that he or she did not supply at all — which would cover someone from whom the goods were stolen, for example. Other defences are that the supply was not in the course of a business and the defendant was not a producer, importer, or own-brand, or, if he was any of these things, the activity was not carried out with a view to profit. If the manufacturer or importer gives away free samples these will be in the course of business. If a manufacturer gives away as a 'pure' gift (that is, with no eye to business benefit) something which he actually manufactures in the course of business can he claim this defence? It would seem not: although he did not supply in the course of business, he is identified as a primary liability holder by virtue of manufacture which is something he does in the course of business. On the other hand, he might be able to establish that the manufacturer was the company, but the gift-giving was done by him as an individual, in which case the liability would rest on the company alone.

Who can sue for what?

The English legislation covers 'damage,' which includes both personal injury and property loss or damage.⁵⁴ This means that economic loss alone is not covered. The LRC endorses this approach. They also propose the adoption of the principle that anyone affected by the goods, whether a user, consumer, or bystander, should be able to sue.⁵⁵ An example would be one of the very few English cases brought under the Act: a patient sued for the additional time and other consequences when a pair of foreign-manufactured surgical scissors fractured in the course of an operation.⁵⁶

⁵¹ s 46.

⁵² See above.

⁵³ s 4.

⁵⁴ s 5(1).

⁵⁵ LRC Report, para 7.54.

⁵⁶ *G v Fry Surgical International Ltd*, a case started in Nottingham County Court but settled, summarised in Christopher Hodges, 'Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products' (1994), reproduced in Kellam et al (note 26 above) (Release 2) [C15.390].

If the injury is to goods and not to the person, the UK Act introduces a restriction: that the goods damaged must be of a sort ordinarily intended for domestic rather than business use, and must actually be used for consumer rather than business purposes. In other words, business users of damaged goods must have recourse to the law of contract or tort. It is not clear whether the LRC wishes to see the same approach in Hong Kong. They say 'any attempt to distinguish between business and private users would be fraught with difficulties'⁵⁷ — but this seems to be restricted to those who receive personal injury. Perhaps the implication is that where damage to property is inflicted the distinction is to be accepted. However, there is no suggestion that the *defective* goods must be those normally provided for domestic or private use (and there is no such requirement in the UK Act).

The UK legislation includes damage to land as well as to chattels. It must, like any other property, be of a sort ordinarily occupied for private purposes and in fact so occupied. One assumes that the LRC intends that real property should be included in Hong Kong also — though the same slight doubt appears over whether it should be for private use only.

The discussion about computer software raises another issue — if a defective disk or program or virus damages another program or data is this damage to 'property'? Indeed, non-electronic goods, such as magnets, may corrupt data or programs. This problem has come up in criminal cases and some courts have held that there is damage to property.⁵⁸ These decisions have been controversial, and again it might be worth giving specific consideration to whether the meaning of property should be clarified.⁵⁹

There is one respect in which the LRC proposals on the nature of the damage are more generous to the plaintiff than under the UK Act. Under the Act the damage must be to some property other than the goods which have the defect. This is a form of exclusion of economic loss. Mrs Donoghue could not have recovered for the price of the ginger beer which was undrinkable because that was damage to the very goods themselves: in other words, compensation for the fact that the goods were worth less than they should have been. Under the Act there may be problems of definition: when is the damage to the same thing? Is a car which crashes because of a faulty tyre a defective car or a car with a defective tyre? (This problem would arise only when the car is new, for replacement tyres are clearly separate.) Is a defective tube on a washing machine which causes a flood which gives rise to a short circuit and fire which destroys the washing machine covered? The Hong Kong LRC proposes not to have the Act's restriction — in other words the damage may be to the very

⁵⁷ LRC Report, para 7.54.

⁵⁸ For example *Cox v Riley* (1986) 83 Cr App Rep 54 — deliberately blanking out a card in a computerised saw which held the programs.

⁵⁹ For a discussion in the criminal context see Martin Wasik, 'Crime' in Saxby (note 38 above).

defective goods themselves.⁶⁰ However, this requires some thought. A piece of equipment, perhaps a computer, or a hi-fi, which simply stops working, will not be covered for one would not describe this as 'damage': the thing is simply inferior. Naturally one would not expect to go anywhere except back to the supplier in such a situation. But the LRC's recommendation means that if your goods are not simply of poor quality but have a self-destructive quality (such as bursting into flames, or a vehicle with faulty tyres or steering which causes destruction of the entire vehicle) you can claim from the importer or the manufacturer as well. There being two concepts (defect and damage), for the new liability to apply it must be shown that the former caused the latter. If the defect is that a screw was not tightened enough, would it be sufficient if it came loose and led to the component that was held by the screw coming adrift? The object might stop working (the component that comes loose might be a vital wire in a hi-fi or a car or computer); but we would normally think of this as a further defect rather than damage. If it is 'damage' there would be a right to go to the importer, or the manufacturer if in Hong Kong, rather than to the supplier. Maybe this does not matter: one would probably find it more convenient to go back to the supplier. But there is potentially a considerable breach in the doctrine of privity here. This may be something which many would not regret, but one would wish to see inroads made on a principled basis. Is it principled that someone who has bought a dud product should be able to go back only to the retailer if the product simply will not work, but can go back to the importer or manufacturer if the fault leads to the product suffering from damage by fire?

What is a defect?

This is in a sense the heart of the proposed new liability: it attaches because there is a defect in the goods. A defect is defined in the English law as occurring where the 'safety of the product is not such as persons generally are entitled to expect.'⁶¹ This formulation has been criticised as having the tendency to reintroduce a negligence standard. Who are 'persons generally' and what are they entitled to expect? Is the expectation to be related to what Hong Kong consumers are entitled to expect? One might have thought that this was the case — but the LRC declined to restrict liability under the proposed legislation to goods for use in Hong Kong. They were prepared to contemplate the possibility of a consumer in California suing for goods emanating from Hong Kong (though not those which came through Hong Kong only in its entrepôt capacity⁶²); such a person would no doubt sue on the basis of what he or she

⁶⁰ LRC Report, para 7.78.

⁶¹ s 3(1).

⁶² LRC Report, para 7.97. In fact, so little that Hong Kong makes these days is actually made in Hong Kong that it is unlikely that many plaintiffs from outside would be able to make use of this possibility of suing a manufacturer here. Though Hong Kong money may make many toys, to take one example of a product which may have a capacity to cause harm, in mainland China or Thailand, the legal entity which does the manufacturing is presumably different.

would expect in California — and the LRC seemed to accept this notion.⁶³ Would the Hong Kong consumer be required to expect less?

A recent fire was more serious in its consequences because foam-filled furniture caused thick smoke. This type of filling has been banned for a long time in the UK.⁶⁴ If the furniture had been supplied after the implementation of a law in Hong Kong based on the LRC report, would the Hong Kong consumer be able to say that 'I, like other persons generally, am entitled to expect that such furniture should not be supplied' — even though it is permitted under Hong Kong law? Or are Hong Kong consumers only entitled to expect that goods will comply with Hong Kong law? It would in fact be most undesirable that the Hong Kong consumer should be at the mercy of the activity or inactivity of the Hong Kong government. The furniture foam is a clear example: manufacturers and importers in Hong Kong should be aware of the risk even if the Hong Kong government has not seen fit to take action. The Consumer Council says that it recommended action on this as long ago as 1990. If the Council are aware of the risk, people in the business ought to be at least as conscious of it.

Perhaps one approach might be to provide that if a defendant can establish that it had complied with the relevant law, as laid down in the Consumer Goods Safety Ordinance, for example, this would be a *prima facie* defence, but the plaintiff would still be at liberty to argue that the safety standards required by law were neither stringent enough, nor what the reasonable manufacturer would have done, so not what the consumer was entitled to expect.

Another issue is perhaps raised by Japanese washing machines into which children have fallen.⁶⁵ These machines contain no mechanism to stop children falling in — and they are large enough for this to happen. There is in fact no mechanism to prevent someone opening the machine while it is operating — unlike machines in some countries. But some of these faults — especially the size of the opening — are readily apparent to users. Does this mean that is all they are entitled to expect? A US court said, 'If the average consumer would reasonably appreciate the attendant risk of injury, it would not be unreasonably dangerous or defective.'⁶⁶ This was so whether the precaution necessary to avoid the accident which occurred was expensive or complex. Such an approach would perhaps restrict the new liability to hidden defects. There is no discussion of these issues in the LRC report. Yet the outcome need not be as held by the US court; it has been suggested that even in the context of

⁶³ Indeed, one assumes that, if action were brought against a Californian retailer, liability in Californian law under the equivalent of the Sale of Goods Ordinance would include failure to comply with Californian laws. Such liability would be passed down the contractual chain back to the Hong Kong exporter.

⁶⁴ 'No Action on Call for Foam Stuffing Ban,' South China Morning Post, 25 March 1998.

⁶⁵ See above.

⁶⁶ *Vincer v Esther Williams All Aluminum Swimming Pool Co*, 230 NW 2d 794, 798 (Wisc) (1975), quoted in Rob Davis, 'Strict Liability in the United States' in Kellam (note 26 above), para 12-200.

negligence it ought not to follow that there is no liability simply because the danger is known or obvious. The question ought still to be whether the manufacturer could have avoided the danger by taking reasonable precautions.⁶⁷ The washing machine cases also show that the 'consumer expectation' approach is inappropriate when we are talking about risk to someone who is not the primary user, especially risk to children. While it must be recognised that not all risk can be eliminated, everyday experience shows that adults often fail to realise the risk to children. In the USA many jurisdictions have moved away from the 'consumer expectation' approach and place more emphasis on 'excessive preventable danger' where there would be liability even if the risk was obvious, provided that the benefits of the design did not outweigh the risk — sometimes known as the 'risk-utility' analysis — or a combination of these two tests.⁶⁸ It might be worth considering a version of this approach for Hong Kong; indeed the courts would be able to adopt such an approach even on the wording of the UK legislation, it has been suggested.⁶⁹ It is proposed that the doctrine of contributory negligence should apply, so foolish consumers would stand to lose some of their damages,⁷⁰ though the foolishness of a parent would not affect a child.⁷¹

What people are entitled to expect depends on factors such as how the goods were marketed, the purposes for which they were marketed, their get-up, instructions and warnings supplied, what it is reasonable to expect people to do with the product, and when they were supplied.⁷² These are accepted by the LRC.⁷³ There is a risk that defendants will argue, as with obvious defects, that an adequate warning which would enable the reasonable consumer to use the product safely satisfies the requirements of the legislation. Yet again it should be possible for a court to hold that more is required. It has been suggested that legislation of the sort we are discussing will lead to more manufacturers making use of warnings, as a way to escape liability. This is of course an improvement on no warnings at all. Absence of warnings would seem to raise the possibility of liability in negligence, in fact. There was a recent press report of a person in Hong Kong who was injured as a result of spraying insecticide over a washing machine in operation, causing an explosion — probably due to a spark from the machine.⁷⁴ A warning of this risk would be an improvement and one would be inclined to feel that the absence of such a warning connotes negligence. But should it stop there? It has been suggested that the courts should not concen-

⁶⁷ See, eg, Harper & James, 2 *Torts* 28.5 quoted in Clark (note 14 above), p 86.

⁶⁸ For example *Barker v Lull Engineering Co*, 573 P 2d 443 (Calif) (1978), discussed in Davis (note 66 above), paras 12-40ff.

⁶⁹ Clark (note 14 above), pp 40ff.

⁷⁰ LRC Report, para 7.55(f).

⁷¹ *Oliver v Birmingham Omnibus Co* [1933] 1 KB 35.

⁷² s 3(2) of the Act.

⁷³ LRC Report, para 7.18.

⁷⁴ 'Insect Spray Sparks Flat Blast,' South China Morning Post, 31 March 1998.

trate on issues of warning rather than of product design, and that what people are entitled to expect should not be decided simply by looking at warning issues.⁷⁵ We all know from the ineffectiveness of tobacco warnings that other factors may be a far more powerful influence on the mind of the consumer.⁷⁶

The development defence

The most controversial aspect of the English law has perhaps been the so-called 'development defence.' This allows the defendant to argue that

the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect.⁷⁷

It has been complained that this was more generous to defendants than the provision in the Directive: 'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.' It will be noticed that the main difference is that the Act defence refers to the ability of a producer of products of the same description to discover the defect. The Directive seems to require that the producer be abreast of research and knowledge more generally. In fact the European Court of Justice declined to hold that the UK had been in breach of its treaty obligations by not adopting the Directive wording. It held that

the wording of s 4(1)(e) of the 1987 Act placed the burden of proof upon the producer, it placed no restriction on the state of scientific and technical knowledge which was to be taken into account and it did not suggest that the availability of the defence depended on the subjective knowledge of a producer taking reasonable care in the light of the standard precaution taken in the industrial sector in question.⁷⁸

The court also pointed out that the Act required that it be construed in such a way as to give effect to the Directive.

In fact the LRC has opted for the Directive wording rather than that of the UK Act.⁷⁹ But even the Directive has been the subject of a good deal of criticism on this topic. It has been asked why the risk of undiscoverable defects should be placed upon the injured individual rather than the manufacturer who stood to gain by placing the product on the market. It is also observed that the

⁷⁵ Clark (note 14 above).

⁷⁶ Stapleton (note 9 above), p 253 cites psychological research demonstrating the ineffectiveness of warnings.

⁷⁷ s 4(1)(e).

⁷⁸ *European Commission v United Kingdom* [1997] All ER (EC) 481, wording taken from the headnote.

⁷⁹ LRC Report, para 7.60.

existence of this defence places the plaintiff under this type of liability in a worse position than a plaintiff in a contract action, where no such defence would be available — if the goods caused damage they would be thought to be unmerchantable. Jane Stapleton concludes that the defect requirement under the Directive, coupled with the provision that the fact that a later product is put into circulation does not necessarily imply that earlier ones were defective, and the development risk defence mean that 'the Directive generates a liability in manufacturers rarely, if ever, greater than liability in negligence and one that is often narrower.'⁸⁰

One wonders whether the defence is likely to be of any significance in Hong Kong. The LRC insisted that it should be introduced to protect Hong Kong manufacturers who they observed have contributed to Hong Kong's success by their ability 'to react more swiftly to the market than Hong Kong's competitors by producing new products at a reasonable price.' However, though one cannot claim that Hong Kong's products cannot be dangerous, in the light of cases about dangerous toys, it would be hard to argue that Hong Kong's products are of the sort that contain risks of which producers could claim to be justifiably unaware. Hong Kong does not produce drugs, except perhaps under licence, or complex machines likely to cause damage to others. It is true that liability for products here which would not attach in the country of the manufacturer would expose importers to a risk that their counterparts would not be under elsewhere; if a Hong Kong importer is held liable he should usually be able to claim on the basis of contract from those from whom he obtained the goods.

The LRC proposes that the 'development risk' defence should not apply if the defendant had failed to comply with a statutory recall notice; such notices may be given under the recent consumer safety legislation.⁸¹ The Commission rejected the idea that the defence should cease to be available if the defendant had failed to take reasonable steps to withdraw goods of whose defect he ought to have been aware, feeling that this was too vague. However, if the risk to consumers was so great as to outweigh the cost and other burdens of recall the defendant would presumably be liable in the tort of negligence.

Limitations

The LRC recommends the adoption in Hong Kong of some, but not quite all, of the restrictions in other countries in terms of time and money. It proposes that, unlike Europe, there should be no minimum size of claim under the proposed legislation.⁸² Nor does it propose the introduction of a maximum

⁸⁰ Note 9 above, p 272.

⁸¹ LRC Report, p. 69. See Toys and Children's Products Ordinance, s 12 and Consumer Goods (Safety) Ordinance, s 9.

⁸² LRC Report, para 7.77.

limit.⁸³ In this, unlike the minimum limit, the LRC was following the English legislation.

It proposes the adoption of a three year limitation period such as is applicable to personal injury actions (as opposed to cases of injury to property), with the same sorts of possibilities for extension when the plaintiff did not know of the injury or the cause of the injury, and a similar overriding discretion in the court.⁸⁴ It also adopts the provision, also found in the UK Act, for a ten-year total cut-off, a guillotine which will drop when ten years have passed from the time a particular defendant supplied the goods. The proposal they think should be reviewed in the future.⁸⁵ The impact of this would be, for example, as the LRC recognise, that in the case of someone who contracts Creutzfeldt-Jacob disease from contaminated beef products, if the disease takes, as it commonly can, over ten years to develop, that person will never have a right of action.

Applying the prospective law to recent problems

It may be of interest to apply the proposals to some of the problems which have attracted publicity in Hong Kong in the past few months. The general view seems to be that blood products, such as plasma, would be covered as 'products.' If imported into Hong Kong, which would be the normal situation, the importer would be the primary liability holder. The body which carried out the transfusion would be the victim's first port of call, and would be liable unless able to provide the identity of the importer within a reasonable time. Unprocessed blood is a different matter but, on the face it, I have suggested that the LRC would be unwise to assume that 'goods' would not cover blood. There may be good reasons for excluding blood from the new strict liability — which would not prevent someone suing if they could show negligence — but it would be best for the new legislation to be explicit on this point. Incidentally, publicity was recently given to a case where the wrong blood type was transfused.⁸⁶ Even if the legislation included unprocessed blood, it is not clear that one would say that blood of the wrong type has a defect. A victim of such an error would still have to sue for negligence (though one would assume that *res ipsa loquitur* would apply).

Second, flu-infected chickens. In any future outbreak the chances of an infected consumer being able to sue would be enhanced by the proposed legislation. The importer will be liable in the case of birds from across the border, and the farmer, one assumes, would be the producer of home-grown birds. These primary liability holders would be able to escape liability if they

⁸³ Ibid, paras 7.66-75.

⁸⁴ Ibid, para 7.80. There is surprising absence of any reference here to the Hong Kong law, which is similar to that in the UK, under the Limitation Ordinance, ss 27-30.

⁸⁵ LRC Report, paras 7.82-95.

⁸⁶ 'The Right Steps to Catch the Wrong Blood,' South China Morning Post, 11 March 1998.

could prove that the birds did not have the defect when they supplied them — a burden which might well be difficult to discharge. Again the consumer would be likely to go in the first instance to the supplier. Some newspaper reports at the time of the outbreak were to the effect that at least one victim had not eaten chicken or come into contact with it at home. If the source of infection seemed to be contact with chicken faeces at a market, the primary liability holders would remain the same; it seems unlikely that they could argue that they had not supplied chicken faeces — the faeces came from chickens which they had supplied. On the other hand, it might well be difficult to identify which chickens were the source of infection, and, if the particular market contained birds from a variety of sources, the plaintiff would be unable to identify the primary liability holder. And in this instance the fall-back position of holding the stall-holder liable would be of no assistance either: first it might be equally difficult to identify at which stall the contamination occurred; second, while the chickens are still in the market the stall owner has not supplied them or their faeces to anyone, so has a defence.

Had the new law been in force at the time of the 1997 outbreak, would the producers or importers have been liable? They would no doubt have raised the development defence: the state of scientific and technical knowledge at the time when they put the product into circulation was not such as to enable the existence of the defect to be discovered. Until this outbreak it seems that no one was aware that such a defect could exist, if one defines the defect as 'fowl infected with a flu virus that could be transmitted to human beings.' Would the situation be different if the situation were to recur? We now know that fowl may carry such a virus. The authorities are checking a percentage of the birds imported into Hong Kong, and of those produced in Hong Kong, to see whether they have the virus. But it will never be possible to detect whether a particular bird has the virus. Does this mean that the state of technology will never be enough to enable producers to be liable for such infected birds — and that contract will remain the only remedy? Or would it be possible to interpret the proposed legislation as meaning that the general possibility of transmissible virus can be detected, so the producers would be liable if any individual fowl were infected? One should not, I would suggest, concentrate only on the testing aspect. The precautions taken by the authorities — slaughter of birds, insistence on greater cleanliness in markets, plans for central slaughtering — suggest that it is believed that it should be possible to prevent the infection arising at all. In other words, now that the risk is known, in future the existence of infected fowl would suggest that someone, somewhere has been at fault. This is precisely the situation that this legislation is intended to deal with, and there should be no chance of raising the development defence.

Another, somewhat similar, recent issue has been cholera-infected cockles believed to have originated in Thailand. These and reef-fish containing

ciguatera toxin raise similar issues. These risks are not new and it would certainly be the case that the development defence would not be intended to cover the situation. Again, someone somewhere has been at fault, and the legislation would exist to remove the necessity for the plaintiff to prove who.

As a final example, how about airport chaos? As I write it is not clear what caused the problems at Chek Lap Kok airport when it opened.⁸⁷ Suppose it should prove to be defective equipment. Would people who were delayed in their travel be able to sue? Presumably not, since there was no damage to property. But perishable goods were also damaged; the owners of these might be able to sue — though if the new legislation required that the damaged goods be in private rather than business use, something which the LRC has left unclear, there might be no liability. If the cause of the problems should turn out to be computers then the issues about whether software is ‘goods’ discussed earlier might also arise — though only if the sort of loss were also covered, of course.

European Community law and Hong Kong

It is particularly interesting to see European Union law having a potential impact on Hong Kong law in this way. This is perhaps the first time that Hong Kong law has been overtly influenced by the law of the EU.⁸⁸ The only other area of significant European influence is the European Convention on Human Rights, a Council of Europe and not a European Union institution.⁸⁹ The UK Act provides that it should be interpreted in a way that gives effect to the Directive, which means that the decisions of English courts may be affected by those of courts of the EU — both the European Court of Justice and the lower court, the Court of First Instance established in 1989. Will Hong Kong courts also look at these decisions? At present it is unlikely that a Hong Kong practitioner would either think of such material or know where to go to get hold of it!⁹⁰ If it were to happen that litigation in this field ‘took off’ in a substantial way, maybe this would change. It is more likely, however, that Hong Kong courts would look to decisions of the courts of England and Australia, which have very similar legislation to that proposed for Hong Kong, and if these courts themselves, as is apparently happening,⁹¹ are prepared to take cognisance of

⁸⁷ An article in the South China Morning Post for 21 July 1998 — Ella Lee, ‘Airport Software “Bug-free”’ — reviewed some of the possibilities, which were reported to include specially prepared or amended software.

⁸⁸ For EU impacts upon the law of another non-European jurisdiction see Martin Vranken, ‘The Relevance of European Community Law in Australian Courts’ (1993) 19 Melbourne ULR 431. Part VA of the Commonwealth Trade Practices Act is based on the 1985 Directive; see *ibid*, p 445, and the LRC Report, p 35; also Kellam et al (note 36 above).

⁸⁹ See, eg, *Cheung Ng-sheong Steven v Eastweek Publisher Ltd* (1995) 5 HKPLR 428.

⁹⁰ LEXIS, the Common Market Law Reports, and the All England Reports (EC series) are possibilities.

⁹¹ See Vranken (note 88 above), p 439 on Australia.

European courts' decisions, these would have an indirect impact on Hong Kong.

The courts are required to take account of the Directive in interpreting the Act. Would a Hong Kong court feel free to do the same? The LRC itself has recommended in another recent report⁹² that a new section be introduced into the Interpretation and General Clauses Ordinance permitting the use of extrinsic materials to resolve ambiguity or obscurity or avoid absurd or unreasonable results. There is a list of relevant material, including any report of the LRC or similar body and 'any relevant treaty or other international agreement that is referred to in the Ordinance or in any of the materials that are referred to in this subsection.'⁹³ Would this be interpreted to cover a document like a European Community/Union Directive? This is not a treaty though it is binding on the UK by virtue of a treaty. The LRC specifically decided not to include any statement on the lines of 'whether or not Hong Kong was bound by it at that time.'⁹⁴ However, this was probably not intended to introduce treaties which in no way bind Hong Kong or even its new sovereign power. On the other hand the Directive is referred to, as we have seen, by the LRC itself, and indeed they intend to incorporate the Directive version of the development defence, so it would perhaps be appropriate to refer to the Directive as though it were incorporated by reference in the LRC report, at least so far as this point is concerned.

A comment on the LRC report generally

This discussion of the Report has suggested at a number of points that it is not crystal clear what the LRC is recommending — for example on whether only 'domestic' property should be protected, or on computer software. Although the Hong Kong Commission is ultimately modelled on that in other jurisdictions such as England its reports do differ in approach. Notably they do not contain a draft Bill. Had the current LRC report had a draft attached it would have been necessary to confront some of the detailed points on which it is now difficult to extract the precise intention of the Commission. The Commission would also have been forced to confront issues such as who precisely is to be liable for primary products.

It must be said that there seem to be a good number of loose ends left hanging, as I have tried to show. Some of the points I have made are unlikely to give rise to problems, and others can be left to the judiciary, but some ought to be sorted out in the legislation itself if it is passed.

⁹² *On Extrinsic Materials as an Aid to Statutory Interpretation* (March 1997).

⁹³ *Ibid.* Annex II.

⁹⁴ *Ibid.* p 211.

On the whole the report is to be welcomed, and in principle the LRC is to be commended for giving greater protection to the consumer than the model on which the report is based. Indeed, if one puts all the differences together, the extent to which the LRC recommends greater protection than the Act is remarkable: no exclusion of agricultural and fishing products, development risk defence perhaps more generous to plaintiffs than that in the Act, including damage to the defective product itself, (probably) no restriction of claims for property damage to domestic or private property, and no minimum value of property damaged. Only where computer software is concerned may the proposals be less generous to plaintiffs.

Although one may be inclined sometimes to criticise Hong Kong law reformers for an excessive reliance on English models, one should note that in this instance the European model has been described as having 'a good claim to be the international standard product liability law'.⁹⁵ It is to be hoped that the few unclear points will not impede the impetus towards implementation. It must be said that there has been no flood of cases in the UK, Europe more widely, and Australia where similar legislation is in force.⁹⁶ No doubt the existence of the legislation has led to some cases being more quickly settled.⁹⁷ One might hope that it has actually led to 'producers' taking more care, which is really the objective of legislation of this sort, and thus to fewer actual accidents.

Jill Cottrell*

Directors: De Jure, De Facto, or Shadow?

Introduction

Hong Kong has been slowly following the rest of the common law world in making those in charge of companies more accountable for their actions. Already more stringent provisions in relation to the disqualification of directors¹ have been introduced as a new Part IV A to the Companies Ordinance.²

⁹⁵ R C Travers, 'A Proposal to Reform Australian Product Liability Law' (1995) 69 ALJ 1006, 1012.

⁹⁶ McGarvie, 'Where are the Cases?' (1995) 6 Aust Prod Liab Reporter 41, reproduced in S G Gorones and Philip H Clarke, *Consumer Protection and Product Liability Law: Commentary and Materials* (Sydney: LBC Information Services, 1997), p 533.

⁹⁷ This is suggested in the articles in each of the two preceding footnotes.

* Senior Lecturer in Law, University of Hong Kong.

¹ See Caroline Hague, 'Disqualification of Directors' in C Booth (ed), *Hong Kong Commercial Law: Current Issues and Developments* (Hong Kong: Hong Kong University Press, 1996).

² Companies Ordinance (the ordinance).